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# WATER REGULATION AND INJUSTICE IN THE UNITED STATES

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# EXECUTIVE SUMMARY

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The notion of “environmental justice” reflects the disproportionately high burden of environmental hazards—such as pollution—borne by low-income communities, communities of color, and indigenous communities, as well as the disproportionately low access of these communities to environmental benefits—such as clean water. This already unequal distribution of environmental costs and benefits has been gradually exacerbated in the United States, as elsewhere, by climate change and the COVID-19 pandemic. Nowhere is the disparity clearer than with respect to water injustice. Over 2 million Americans are living without access to running water and basic indoor plumbing. Many more live without sanitation. Two causes of water injustice in the United States are a fragmented legal framework governing water issues and a lack of recognition—at both the federal and state level—of the human right to water and sanitation.

Water injustices include a lack of access to clean drinking water, inequalities in the enactment or enforcement of water-specific laws and regulations, and the exclusion of community voices from federal water policy. In the absence of a national program to assist low-income residents, state-to-state variations in water pricing forces vulnerable communities to trade off between safety and affordability—as in Flint, Michigan. At the core of these issues is the underrepresentation of ethnic and racial minorities in government, law, and business, all but ensuring de facto

exclusion from environmental decision-making. Discriminatory zoning and land-use regulations, and a chronic lack of transparency and inadequate access to information concerning water issues exacerbates these disadvantages. All of these factors have led to obstacles in establishing the right to water and sanitation, experienced disproportionately by Black, Latinx, Native, homeless or otherwise disadvantaged people in the United States.<sup>1</sup>

## THE SPLINTERED FRAMEWORK BEHIND WATER INJUSTICE

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Water in the United States is regulated at both the federal and state levels. In practice, what that means is the existing framework is splintered among hundreds of federal laws, regulations, and court rulings that distribute authority over water haphazardly among federal, tribal, state, and local governments.

At the federal level, approximately 30 agencies in 10 different departments have authority over a wide range of water-related activities.<sup>2</sup> While federal policies to address environmental injustice exist, water has rarely been the focal point of any comprehensive action by the United

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1. This report is based in part on Tamar Meshel, *Environmental Justice in the United States: The Human Right to Water* 8 WASH J ENV'T'L L & POL'Y 101 (2018).

2. Juliet Christian-Smith & Lucy Allen, *Legal and Institutional Framework of Water Management*, in A TWENTY-FIRST CENTURY U.S. WATER POLICY (Juliet Christian-Smith & Peter H. Gleick, eds, 2012) at 25.

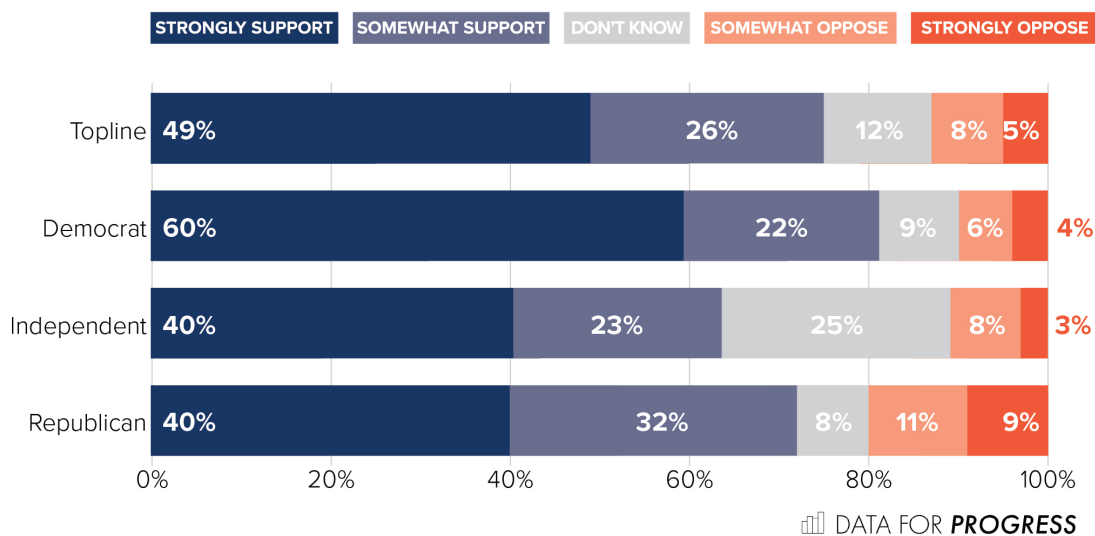
States. The federal Clean Water Act (CWA) is intended to restore and preserve the chemical, physical, and biological integrity of our water. But the CWA is not consistently enforced by the Environmental Protection Agency (EPA)—even when disadvantaged communities are subjected to wastewater discharges, water that’s so polluted it should be routed into sewers.<sup>3</sup> Similarly, while the EPA and Safe Drinking Water Act (SDWA) set health standards for drinking water, these are inconsistently enforced. Moreover, many households in rural areas rely on private wells exempted from the protections of the SDWA. Although the Civil Rights Act bars recipients of federal dollars from discriminating on the basis of race, color, and national origin, the federal government has failed to respond to many environmental justice complaints under this law—much less water justice.

Aside from this federal control, water rights in the United States are generally allocated according to state and local laws. Legal frameworks governing water allocation differ among the 50 states, and their complexity makes it difficult to efficiently

regulate water. These frameworks also largely fail to account for, and can therefore exacerbate, inequalities and barriers to water access among disadvantaged communities. In Alabama’s Black Belt region, for instance, low-income households cannot afford adequate residential septic systems. State law requires such systems, but Alabama does not aid low-income households in meeting this requirement. Instead, residents who cannot afford septic systems can be arrested.

In sum, while there is a legislative framework in place in the United States to govern water-related activities, there is no consistent policy that adequately accounts for the systemic disadvantages suffered by vulnerable communities nationwide—despite significant and widespread public support for water-specific assistance. In a poll conducted by The Justice Collaborative Institute and Data for Progress, 75% of likely voters agreed that states and the federal government should direct funding for clean water to cities suffering budget shortfalls, including 72% of Republicans.

**Do you support or oppose the federal government and state governments providing funds to ensure that local governments are able to provide clean water?**



3. Amy Vanderwarker, *Water and Environmental Justice*, in *A TWENTY-FIRST CENTURY U.S. WATER POLICY* 71 (Juliet Christian-Smith et al. eds., 2012).

# ESTABLISHING A RIGHT TO WATER IN THE UNITED STATES

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The human right to safe drinking water and sanitation has been recognized in international treaties and laws that impose specific obligations on countries to provide equal access to affordable, sufficient, safe and acceptable water. In other words, countries must help secure water for individuals and communities, providing it where people are unable to do so by themselves for reasons beyond their control. Other countries strive to ensure adequate supplies of water are available to households that cannot afford market prices. Yet as recently as 2014, the United States asserted to the United Nations that commitments to safe drinking water and sanitation do not include treating access to water as a human right.

Indeed, a human right to water and sanitation is not recognized at all at the federal level, is not protected in the Constitution, and is only explicitly incorporated in the laws of three states—California, Massachusetts, and Pennsylvania. This state legislation is limited, incomplete, and ineffective at times. While California recognizes the right to water, its law does not obligate the state to ensure access or develop water infrastructure. Massachusetts legislated an “environmental right to water” in an amendment to the state constitution, but the law has been narrowly interpreted and does not reflect international standards. Meanwhile, Michigan still faces “a troubling inability to protect the human right to water through legal measures”.

Widespread recognition of a human right to water in the United States would carry considerable legal, political, and humanitarian benefits. It could incentivize local, state, and federal authorities

to implement more water-just measures and promote the affordability, access, and use rights of disadvantaged communities—consistent with the United Nations Special Rapporteur’s legal and policy recommendations to the United States. Laws and regulations incorporating the human right to water as a norm would push public authorities to comply with minimum standards and water justice principles. These include affordable access to basic water and sanitation services for vulnerable communities as well as access to information and basic due process guarantees—for instance when disconnecting residents from essential water services—and adequate protections from industrial and agricultural pollution.

Establishing a human right to water in America will also empower communities to seek enforcement of equal access to water and sanitation. The engagement and involvement of affected vulnerable communities could assist in overcoming the socioeconomic and political barriers that result in water injustice. Such positive changes could be facilitated by promoting affected peoples’ participation from the ground up—that is, through community organizing—in addition to the top-down reforms to ensure inclusion in governmental decision-making processes. Public participation could be encouraged by connecting with local communities and informing and bringing different communities with shared or similar interests together. This strategy could help include low-income renters and residents of unincorporated communities.

Finally, recognizing the human right to water would also assist the United States in complying with its other international obligations—a start to repairing its standing globally. The race-linked lack of access to clean drinking water and sanitation in the United States is indisputable. The foundation for progress exists: The federal

government has acknowledged that water-related discrimination may violate international human rights law. The challenge ahead lies in achieving the recognition that the right to water is part of the right to life enshrined in the International Covenant on Civil and Political Rights, ratified by the United States in 1992; the Universal Declaration of Human Rights; and the American Convention on Human Rights.

## CONCLUSION

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Federal and state laws in the United States do little to protect the right to water and sanitation of vulnerable communities. Only a few states explicitly recognize a human right to water, and the current water-related legal framework in the United States is inadequate. With growing water scarcity highlighting the international recognition of the human right to water, its incorporation into legislation and policies in the United States stands to unify policies, provide normative content for

legislation, prevent water inequality and injustice, and facilitate compliance with the United States' international obligations. The federal and state governments should devise a coordinated and comprehensive policy to ensure that public water resources are used not only efficiently but also equitably. The basic framework for such a policy already exists but it should be strengthened through the incorporation of the human right to water as a unifying theme. The question is not whether a human right to water exists, but whether our governments are fulfilling it.

## METHODOLOGY

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From 7/10/2020 to 7/12/2020, Data for Progress conducted a survey of 1,390 likely voters nationally using web panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is +/- 2.6 percent.